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NO. 88-1823

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IN THE
SUPREME COURT OF THE UNITED STATES

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RICHARD GLADDEN,
Petitioner

VS.

RANDY W. ROACH, ET AL.
Respondents

* * * * * * * *

BRIEF OF STATE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * * * * * *

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Asst. Attorney General

LOU McCREARY
Executive Asst. Attorney General

JAMES C. TODD
Asst. Attorney General
Chief, General Litigation Division

ATTORNEYS FOR RESPONDENTS

ON THE BRIEF:
DAVID FREUDIGER
Legal Intern

18 pp

QUESTIONS PRESENTED

1. May a person refuse to disclose his true name and address during the post-arrest booking process pursuant to his Fifth Amendment privilege against self-incrimination?

2. Does charging a person with a criminal offense under Texas Penal Code Section 38.02 for refusing to disclose his true name and address during the post-arrest booking process unconstitutionally impose a cost on the Fifth Amendment privilege against self-incrimination?

3. Under the case or controversy requirement of Article III, is a Plaintiff who seeks to enjoin enforcement of a State law which he alleges has violated his Fifth Amendment privilege against self-incrimination, prejudiced by being required to prove standing by demonstrating he is "more likely than others" to be arrested for violating that law?

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TO THE HONORABLE MEMBERS OF THE SUPREME COURT OF THE UNITED STATES:

Respondents State of Texas and Randy W. Roach, (the State Respondents, called the State Defendants in the Courts below) file this Brief in Opposition to the Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 864 F.2d 1196 and is attached to Petitioner's Petition at Appendix A-1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition For Writ of Certiorari.

STATUTES AND RULES INVOLVED

Section 1983, Title 42, United States Code provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

Texas Penal Code Annotated Section 38.02 (repealed 1987) provided:

> "Sec. 38.02. Failure to Identify as Witness.
>
> "(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

The present version of Texas Penal Code Annotated Section 38.02 (Vernon, 1989), effective September 1, 1987, which petitioner seeks to have Respondents enjoined from enforcing in the future, provides:

> "Section 38.02. Failure to Identify.

"(a) A person commits an offense if he intentionally refuses to report or give his name, residence address or date of birth to a peace officer who has lawfully arrested the person and requested the information."

STATEMENT OF THE CASE

A. NATURE OF CASE AND DISPOSITION IN COURTS BELOW

This case is a civil rights action against eleven employees of the City of Denton, the City of Denton, and a North Texas State University police officer, arising out of numerous arrests and incidents.

A jury answered all issues in favor of Defendants. (R. p. 655-668). The District Court awarded $1.00 in nominal damages against the City. Judgment for Defendants was entered on all of the other claims.

Petitioner appealed to the Fifth Circuit Court of Appeals on six points of error related to his arrests on April 23, 1983 and September 15, 1984. All of Petitioner's points were rejected, and the Court of Appeals affirmed the District Court's judgment.

Petitioner is now seeking a writ of certiorari on three points, all related to his arrest on April 23, 1983 by North Texas State University Officer Roach, and his subsequent booking at the City of Denton jail.

B. STATEMENT OF FACTS

Respondents do not fully agree with the Statement of the Case as contained in the Petition for Writ of Certiorari. Instead, Respondents incorporate by reference the Statement of the Facts as set out in the opinion below.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit's holding that the Fifth Amendment privilege against self-incrimination does not give a person the right to refuse to disclose his true name and address during the post-arrest booking process is consistent with decisional law of other Circuits and the Supreme Court.

Contrary to Petitioner's assertion, the First Circuit's decision in *United States v. Downing*, 665 F.2d 404 (1981), does not conflict with the decision of the Fifth Circuit in this case. In reality, the facts of the *Downing* case are easily distinguishable from the case now before this Court.

The defendant in *Downing* was placed under arrest for violations of federal drug laws and was advised of his *Miranda* rights. After taking down the defendant's personal history, the investigating officer requested that the defendant empty his pockets and surrender various articles, including some keys. After questioning him about these keys, the officer learned of the existence and location of a Cessna airplane. Incriminating evidence was obtained through searching the airplane and questioning airport employees. *Downing*, 665 F.2d at 405.

The *Downing* court never even considered whether taking the defendant's personal history violated his right against self-incrimination. In fact, the court stated:

> [C]ourts have held that *Miranda* does not apply to "biographical data necessary to complete booking", *United States v. Menichino*, 497 F.2d 935, 941 (5th Cir. 1974); see *United States ex rel. Hines v. LaVallee*, 521 F.2d 1109, 1113 (2d Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976) ... because information about a suspect's identity is not "testimonial" in character, *United States v. Prewitt*, 553 F.2d 1082, 1085-86 (7th Cir.), *cert. denied*, 434 U.S. 840 (1977) ...

Id. at 406.

Concededly, this limited exception to the right "to remain silent" does not encompass all questions asked during the booking process. The *Downing* court, however, specifically stated that it was only "the questions about [defendant's] keys and airplane [that] were 'reasonably likely to elicit an incriminating response.'" *Id.* at 407. The questions concerning the defendant's personal history were not an issue in the case.

This holding is consistent with Supreme Court precedent. This Court has held that two requirements must be satisfied before government-compelled disclosure implicates Fifth Amendment concerns. First, the information sought must itself "confront the claimant with substantial hazards of self-incrimination." Second, the disclosure must be testimonial in nature. *California v. Byers*, 91 S.Ct. 1535, 1538 (1971).

In *Byers*, this Court noted that "[d]isclosure of name and address is an essentially neutral act" akin to the requirement that one file a state income tax return. *Id.* at 1540. By the same token, one's name and address does not "involve ... the admission of a crucial element of a crime." *Id.* at 1538, quoting *Albertson v. SACB*, 86 S.Ct. 194, 199 (1965).

In addition, the Supreme Court has consistently upheld compelled participation in blood testing, line up procedures and voice exemplars against Fifth Amendment challenges. *Schmerber v. California*, 86 S.Ct. 1826 (1966); *United States v. Wade*, 87 S.Ct. 1926 (1967). Clearly, requiring an arrested person to reveal his name and address is no more "testimonial" than requiring a criminal suspect to speak in order that he might be identified by his voice.

It can scarcely be argued that the information requested of Petitioner posed "substantial hazards of self-incrimination." Respondent Roach had arrested Petitioner for public intoxication. His name and address would play no substantial part in determining his guilt or innocence of that charge. Had he complied with officer's request the State would not have been in a better position to prosecute Petitioner.

Finally, the Supreme Court has held that *Miranda* warnings are required only prior to "custodial interrogation." The Court defined "custodial interrogation" as

> any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know to elicit an incriminating response.

Rhode Island v. Innis, 100 S.Ct. 1682, 1689 (1980) (emphasis added). Under this definition, the routine questions asked by Respondent Roach cannot be described as the type of custodial interrogation that invokes Fifth Amendment protections. The decision of the Fifth Circuit was consistent with these decisions of the Supreme Court.

II. The Fifth Circuit's decision adverse to Petitioner's Fifth Amendment claims does not present to this Court the proper case in which to redefine the Fifth Amendment restraints on law enforcement officers during the booking process.

The Court has been called upon many times to weigh the interest of the accused in being free from official abuse against the interest of law enforcement officials in combatting crime. Clearly, these interests should be weighed carefully when they are roughly of equal dignity. Texas Penal Code Section 38.02, however, does not present such a situation to this Court.

Texas Penal Code Section 38.02 makes it an offense to fail to identify oneself only after a lawful arrest. The interest of law enforcement officials in fixing a suspect's identity at this point in the booking process is inarguably high. Governmental entities that maintain jails are responsible for the efficient and orderly administration of those jails. This cannot be achieved if prisoners cannot be identified and classified.

Police custodians are also responsible for the physical safety and well being of their prisoners. Without the ability to identify these prisoners, medical treatment can be difficult to obtain. It would also be more difficult, in the absence of

proper identification, for police custodians to separate more violent repeat offenders from first-time offenders and others who pose a less serious threat.

The information requested of Petitioner by Respondent Roach also operates as a check on police power. Booking procedures require that records be maintained on persons taken into custody and the charges filed against them. This provides protection against improper police tactics such as secret arrests. *Wainwright v. City of New Orleans*, 88 S.Ct. 2243 (1968).

In the Fourth Amendment context, the Supreme Court has held that

> if there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information.

Hayes v. Florida, 105 S.Ct. 1643, 1647 (1985), citing *United States v. Hensley*, 105 S.Ct. 675 (1985). Since the Fourth Amendment will allow officers to investigate a person's identity in the course of an investigative stop, and given the absence of Fifth Amendment implications (as discussed in part I), officers should be allowed to obtain a person's identity after a lawful arrest in order to process that person into jail.

Petitioners assert that this case would give this Court the opportunity to "provide urgently needed constitutional guidelines for all police officers" by "condemning Respondent Roach's assault on Petitioner for exercising the right to

silence." (Pet. pp. 20-21). Respondents take strong exception to this characterization of the facts. As the Court of Appeals more accurately describes the incident, "Gladden attempted to use the phone without permission and was physically restrained by officer Roach." (Pet. App. p. A-3).

Since the information requested of Petitioner by Respondent Roach is so vital to an orderly and efficient booking process, an officer's ability to obtain this information should not be impeded. Any challenge to Texas Penal Code Section 38.02 would constitute just such an impediment. Hence, this is not a proper case to modify restraints on the activities of law enforcement officers during the booking process.

III. The Fifth Circuit's holding that Petitioner did not have standing to seek to enjoin enforcement of Texas Penal Code Section 38.02 in no way prejudiced Petitioner since he had no legal basis to assert standing.

In the courts below, Petitioner sought a declaratory judgment that Texas Penal Code Section 38.02 is unconstitutional and sought to enjoin its further enforcement. Article III of the United States Constitution, however, mandates that an actual "case or controversy" exist before a federal court can assume jurisdiction. *Flast v. Cohen*, 88 S.Ct. 1942 (1968). In order to present a viable claim for equitable relief, a complainant must be in "real and immediate", as opposed to a "conjectural or hypothetical", danger of injury. *Golden v. Zwickler*, 89 S.Ct. 956, 960 (1969). Further,

> past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief,

> however, if unaccompanied by any present adverse effects.

O'Shea v. Littleton, 94 S.Ct. 669, 676 (1974).

This Court's decision in *City of Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983) is analogous to the case at bar. The complainant in *Lyons* sought equitable relief against the Los Angeles Police Department because of its regular use of chokeholds in detaining arrestees. The complainant, however, had only suffered once from the application of a chokehold. This Court held that one incident was insufficient to present a justiciable case or controversy under Article III. *Id.* at 1670. Moreover,

> Lyon's assertion that he may again be subject to an illegal chokehold [did] not create the actual controversy that must exist for a declaratory judgment to be entered.

Id. at 1666.

Like the complainant in *Lyons*, Petitioner has been arrested only once for violation of Article 38.02. In fact, Petitioner has been arrested for any reason only in Denton, Texas (TR, p. 282). Since the events giving rise to this action, Petitioner has severed all ties with the Denton community. (TR, pp. 281-282). Given the applicable law and facts, the courts below held that there was no real or immediate threat that he would suffer the same injury in the future. (App., pp. A-9-10).

Respondent Roach disputes Petitioner's assertion that the *Lyons* decision was narrowed by last term's decision of *Honig v. Doe*, 108 S.Ct. 592

(1988). In that decision, this Court stated that the respondent in *Lyons*

> lacked standing to seek injunctive relief because he could not plausibly allege that police officers choked all persons whom they stopped, or that the City "authorized police officers to act in such manner."

Id. at 603.

Rather than narrowing the *Lyons* decision, the Court in *Honig* seems to merely reiterate the long-standing requirement that one seeking equitable relief must be in a "real and immediate" threat of injury. *Golden v. Zwickler*, 89 S.Ct. at 960. Like Respondent in *Lyons*, Petitioner here cannot plausibly allege that police officers will charge all persons arrested with a violation of Texas Penal Code Section 38.02.

Regardless of the standard employed by the Fifth Circuit to deny standing to Petitioner, Petitioner has failed to demonstrate, in light of Supreme Court precedent, that he was in a real and immediate threat of injury. Therefore, this case does not present this Court with a reasonable opportunity to redefine the principles of standing.

It is also important to note that Petitioner's argument on this point is irrelevant if the Fifth Amendment privilege against self-incrimination does not give a person the right to refuse to disclose his true name and address. The Fifth Circuit stated

> [I]f no such privilege exists, then clearly the statute does not unconstitutionally impose a cost on the exercise of it. Consequently, even had the court found

> that Gladden had standing to request injunctive relief, it properly denied it.

(App., pp. A-12-13).

Even if Petitioner did have standing to seek an injunction against the enforcement of Texas Penal Code Section 38.02, the result of this case would not be changed unless this section of the Texas Penal Code were held unconstitutional.

CONCLUSION

For the foregoing reasons, Respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General

LOU McCREARY
Executive Assistant Attorney General

ON THE BRIEF:
DAVID FREUDIGER
Legal Intern

JAMES C. TODD
Assistant Attorney General
Chief, General Litigation Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
(512) 463-2120
ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been sent via U.S. Mail, certified, return receipt requested, on this the _____ day of June, 1989, to:

Don Gladden
Law Offices of Don Gladden
P.O. Box 50686
Fort Worth, Texas 76105

JAMES C. TODD
Asst. Attorney General